

# Section 1

## Rulemaking in General

This section briefly describes why rules exist, how they are created, and how they are organized. It is organized from a general understanding of rulemaking to a more specific understanding of rulemaking.

### Definition of *rule*

A.R.S. § 41-1001(17) states: “Rule” means an agency statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency. Rule includes prescribing fees or the amendment or repeal of a prior rule but does not include intraagency memoranda that are not delegation agreements.

For the purpose of this manual, the general term *agency* is used to refer to a state agency, board, or commission.

### The need for rules

- **Rules implement legislative policy.**

Usually, the legislature establishes broad policy and general standards for the operation of a program. The legislature may prefer to delegate responsibility to an agency to determine how a program should run. The legislature grants authority to an agency to define these details in accordance with the broad statutory guidelines.

*Example:*

A.R.S. § 8-126 requires the Department of Economic Security (DES) to make rules for licensing adoption agencies and for the form and content of investigations, reports, and studies concerning adoption placement. DES must define the requirements for licensure as an adoption agency: how to apply to become licensed; how often a license must be renewed; what procedures an agency must follow to renew a license; what circumstances will lead to suspension or revocation of a license; and what hearings or appeals are available to an agency to challenge disciplinary action. The rules also prescribe the requirements for certification of prospective adoptive parents, certification studies, placement investigations, and placement reports.

- **Rules tell the public how to do or obtain something, or what can happen if something is not done.**

*Example:*

A.R.S. §§ 5-525 and 42-133 give DES the right to collect debts owed to DES by the set-off of the debtor’s lottery winnings or income tax refund. DES has a rule that tells debtors how to protest the setoff: what papers to file, with whom to file them, the number of days in which the debtor must file the protest, etc. The rule also states that the setoff will become final if the debtor does not protest the setoff. (See A.A.C. R6-1-201 and R6-1-202)

- **Rules set standards and limits for the exercise of discretion.**

*Example:*

The DES child care rules allow DES to revoke a child care provider’s certificate if the provider fails to accept DES-referred children on three consecutive occasions. This rule ensures that the certification specialist does not revoke one provider’s certificate for three refusals and another provider’s certificate for five refusals. (See A.A.C. R6-5-5208(E))

### The limits of an agency’s rulemaking powers

- An agency can make rules only if the legislature or a court gives the agency the power to do so. That power can be **general** or **specific**.

*Example:*

**(General authority)** A.R.S. § 41-1952 establishes the Arizona Department of Economic Security. A.R.S. § 41-1954 contains a long list of powers and duties that the Legislature has conferred on DES, including the power to “[a]dopt rules [DES] deems necessary to further the objectives and programs of the department.”

*Example:*

**(Specific authority)** A.R.S. § 41-1992 specifies certain basic requirements for hearings and appeals of DES decisions. DES is required to “prescribe by regulation procedures for implementing the provisions of this section.”

- The statutory authority conferred by the Legislature always sets the boundaries of the

agency's rulemaking authority. Agency rules must be consistent with, and cannot exceed or diminish, the statutory authority granted to the agency. Rules must also be consistent with the standards reflected in the legislative or congressional intent being implemented by rule.

*Example:*

A.R.S. § 41-1993(B) allows persons aggrieved by a decision of the DES Appeals Board to appeal that decision to the Arizona Court of Appeals by filing "an application for appeal . . . within thirty days of the date of mailing of the decision upon review." The appeal time is fixed by statute. DES could not make a rule giving parties 45 days to file the appeal because a longer time-frame would be inconsistent with the statute. Similarly, DES could not make a rule requiring parties to file an appeal within 14 days. A more restrictive rule would also be inconsistent with legislative intent.

## What doesn't belong in rules

- A statement of purpose, goals, or objectives that tends to be explanatory rather than regulatory. (Such a statement may, however, be included in the preamble, which is part of the notice of rulemaking activity.)
- A statement of, or citation to, statutory authority—although cross-references are allowed.

*Examples:*

*Wrong:* Any person may petition an agency for the adoption of a rule. (A.R.S. § 41-1033) Any person who wants the agency to adopt a rule shall file a written petition with the agency's director.

*(This example simply cites and paraphrases the statute.)*

*Right:* To petition for rulemaking action, as provided in A.R.S. § 41-1033, a person shall file a written petition with the Department's director. The petition shall specify the following . . .

*(This example provides guidance on which statute is the subject of the rule but does not unnecessarily repeat statutory language.)*

- Matters concerning "only the internal management of an agency" which do not "directly and substantially affect the procedural or substantive rights or duties of any segment of the public." (A.R.S. § 41-1005(A)(4))

*Examples:*

Directions to agency employees on how to request a reasonable accommodation under the Americans With Disabilities Act;

Directions to agency employees on how to grieve employee performance evaluations; and

Directions to agency employees on the use of copy machines and telephones.

## Rule vs. policy

- **Examine the statutory authority.** Sometimes the Legislature will mandate that an agency make rules concerning a particular subject.

*Examples:*

The division shall establish rules for licensing agencies, including professional licensing, and suspending, revoking, and denying licenses.

The director shall make rules with respect to the time in which a recipient must notify the department of a change in circumstances affecting the recipient's eligibility.

- **Without a statutory mandate, it is not always clear when something belongs in a rule and when something belongs in a policy manual.** Ask whether this requirement will bind only personnel within the agency, or will it bind the outside world? Will the agency use this rule to make distinctions in treatment? (Who is eligible for benefits and who is not? Who is subject to penalty and who is not? Who must comply and who is exempt?) If the answer is yes, the requirement belongs in a rule.
- If the requirement merely spells out **internal procedures**, such as advising an employee how to process an internal form or which supervisor to consult in a particular circumstance, the requirement or process does not belong in a rule.
- **Any requirement or interpretive opinion that directly and substantially affects the public should be in a rule.** Agencies have been successfully sued for relying on policies to control matters that should be made in rules.

## Notices of Substantive Policy Statement and Guidance Documents

- The Administrative Procedure Act (APA) requires the Secretary of State's office to publish summaries of "substantive policy statements" and "guidance document publications" in the *Register*. (A.R.S. § 41-1013(B)(14)) A "substantive policy statement" is a "written expression" that explains the agency's "current approach to, or opinion of," a constitutional, statutory or regulatory requirement or a

judicial or administrative decision, or the agency's practices and procedures regarding such a requirement or decision. (A.R.S. § 41-1001(20))

- The APA requires an agency to submit summaries of substantive policy statements to the Secretary of State for publication. (A.R.S. § 41-1091) An agency must also publish a directory summarizing its rules and policy statements. (A.R.S. § 41-1091(C)) Although the APA does not penalize an agency for failing to do so, the agency should make a good faith effort to abide by these requirements and notify the public of such documents.

## The review process

After your agency determines who will be reviewing the rule, be certain that the reviewer is (or the reviewers are) involved in the entire rule process. Also assess who may be interested in the rule. Determine whether the agency will involve those interested and, if so, at which stages of the process.

### APA REQUIREMENTS

Rather than mandating public participation in the rulemaking process, the APA creates opportunities for public involvement in that process. The burden falls on the public to take advantage of those opportunities. Opportunities are created through the notice and comment process.

- The APA requires the agency to prepare and make available to the public the regulatory agenda that the agency expects to follow during the next calendar year. (A.R.S. § 41-1021.02)
- The APA requires the agency to inform the public that the agency intends to work on a particular rule by publishing a Notice of Rulemaking Docket Opening in the *Register*. (A.R.S. § 41-1021(C))
- After the agency has drafted the rule and is ready to begin the process of making the rule into law, the agency must tell the public what the rule says and what economic impact the rule is likely to have, by publishing a notice and the text of the proposed rule in the *Register*. (A.R.S. § 41-1022(A))
- If a person has asked to be notified of a proposed rulemaking, the agency must provide notice at the time the notice of proposed rulemaking is filed with the Office. (A.R.S. § 41-1022(C))
- The agency must provide copies of rulemaking documents to members of the public who request them. (A.R.S. § 39-121)
- The agency must maintain an official rulemaking record and make it available for pub-

lic inspection. (A.R.S. § 41-1029)

- The agency must allow at least 30 days after publication of the proposed rule for public comment before closing the record. (A.R.S. §§ 41-1022(D) and 41-1023(B))
- The agency is required to conduct an oral proceeding (public hearing) on a proposed rule if the agency receives a written request for one. When the agency schedules an oral proceeding, the agency must give the public 30 days' notice of the scheduled proceeding. An oral proceeding must be held at a location and time that affords reasonable opportunity for persons to participate. It must be conducted in the manner described in (A.R.S. § 41-1023(D))
- Public comment is allowed at the Governor's Regulatory Review Council (G.R.R.C.) meetings within the parameters of (A.R.S. § 41-1052)

### INTERNAL AGENCY REVIEW AND EVALUATION

- Assess what effect the rule will have on the regulated public and whether the rule will be controversial. Determine the extent of public participation and resolve any controversial issues at the beginning of the process. At this point an agency should request a review by its agency attorney or assistant Attorney General.
- Establish an agency internal review process to evaluate the substance and legal accuracy of the rule.
- The review process should also evaluate the clarity of the rule:
  - Evaluate whether the rule is clear, concise, and understandable.
  - Determine whether the headings are helpful and the wording is clear and understandable. Do not rely on the headings to convey meaning. Because the heading is not legally part of the rule, the rule must stand alone.
  - Give reviewers a set of questions to answer from the rules and ask the reviewers how easy or difficult the rule is to use and understand.
  - Rewrite or reorganize a rule if any part is ambiguous, too specialized, or requires more knowledge of the subject matter than is possessed by the intended audience.

### INTERAGENCY REVIEW

When a rule affects more than one agency, the promulgating agency should ask each affected agency to review the rule and comment on it.

These reviews can eliminate overlaps or conflicts, assess cumulative impacts, and shape priorities.

### STAKEHOLDER AND PUBLIC REVIEW

Each agency determines the process it will use to obtain public involvement and comments. Some considerations relating to public involvement include the following:

- Assume interest, not disinterest, regardless of how far from the “heart” of the process some segments of the public may appear to be. Many government agencies think *only* of forming an advisory committee, or *only* of holding a hearing. The tendency to use only these techniques reflects a failure to clarify who needs to be involved. There is no single public, but different levels of public based on differing levels of interest and ability. Agencies that offer “one-size-fits-all” opportunities for public participation may find themselves dissatisfied with the content of that effort and may leave the public feeling frustrated by or discounted in the public decision-making process.
- Reviewers may say little or nothing to the rulemaking staff. They may work only from the agency’s public information releases or from agency responses to questions. They may be observing just for themselves, or they may be reporting their observations to other units of government, to public interest groups, or to special interest organizations. When agencies pare a mailing list to weed out those who do not seem to be actively involved, they weaken this area of participation.
- Reviewers may work by mail or telephone. If an agency wants a large number of public reviewers, it must increase its efforts enough to formulate questions and develop a response format that allows reviewers to participate at their own convenience. In responding, participants may commit to recording their opinions.
- There are some people for whom the decision is so important that their willingness to be involved goes beyond the effort of just replying to agency proposals or questions. For them, interest and knowledge make their direct involvement imperative in the rulemaking process.
- Develop a comprehensive mailing list at the outset of the process. Take into consideration those people who have chosen not to become involved but who may be interested in the process and may want to be informed of what is going on.
- Accept the fact that, often on geographically

diverse or controversial projects, varying groups will have different agendas. Repeatedly bringing these groups together for public meetings may deteriorate into unproductive “soap-boxing.” Acknowledging these agendas, if they exist, is more effective. Consider forming focus groups, identifying specific issues, and bringing these issues together via representatives of each group. Have a mechanism in place to publicize every group’s concerns and to respond to and publicize responses to those concerns.

- Establish and maintain as many strategically located repositories for rulemaking documents as can be managed. In theory, all members of the interested public should have reasonable access to the information.

### ADDITIONAL AGENCY PROCEDURES

Although the burden falls on the public to take advantage of the opportunities created by the APA, the agency can take affirmative steps to involve the interested public in its rulemaking activities. Public involvement can begin at the preliminary drafting stage and extend through the entire rulemaking process. Getting consensus before beginning to draft rules makes the writer’s task easier and saves an enormous amount of time and frustration later on.

- The agency may choose to have broad-based workgroups of internal and external stakeholders draft a set of rules. The more stakeholders, clients, and customers the agency involves in drafting the rules, the greater degree of “buy in” the agency is likely to have in the final product. At the same time, the difficulty and length of the drafting process increases in proportion to the number of people involved.

*Example:* When DES decided to update its foster homes licensing rules, DES assembled a large workgroup to draft the rules. The workgroup included people who must apply the rules (internal licensing staff), the people regulated by the rules (foster parents), the people protected by the rules (foster children), and other people who interact with these groups (the Attorney General’s office, the Department of Health Services, and the Administrative Office of the Courts.)

- The agency may solicit comments on the rules, either before or after publication of the proposed rules in the *Register*. The agency may want to identify affected stakeholders, send those stakeholders a set of draft rules (regardless of whether the stakeholders have asked for copies), and ask for comment.

*Example:* When DES makes rules involving welfare benefit programs, DES sends copies of the rules to law school legal clinics and

legal aid organizations throughout the state and requests comment. These groups rarely participate in drafting the rules; however, they welcome the opportunity to comment. These groups represent the interests of welfare beneficiaries who may lack the legal expertise to comment for themselves.

- Some agencies have existing mechanisms for informing their interested public that rulemaking is occurring.

*Example:* The DES Division of Developmental Disabilities publishes a monthly newsletter that is distributed to providers, advocates, families, and clients. Any news about rulemaking activity, including the dates and locations of public hearings, is included in the newsletter.

- The degree of public participation the agency may wish to invite will vary with the circumstances of the rulemaking. Are time constraints involved? Are the rules likely to be controversial? The benefits of obtaining public comment include:
  - **Saving time and effort.** The agency runs a risk of the public rebuking a final rule if it passively waits for the public to “take the initiative” to comment on the proposed rules. Interested members of the public may wait until adoption of the rule appears imminent to make their comments. If comments made at a G.R.R.C. meeting or public hearing result in “substantial changes” to the rules, the agency must notice the changes to the rules and open the public comment period again, which delays the rulemaking. By involving affected members of the public early in the drafting process, the agency may avoid future problems and delay.
  - **Obtaining G.R.R.C. approval.** The agency can potentially use these voluntary efforts to its advantage in proceedings before G.R.R.C. G.R.R.C. is more likely to approve a rule that is the product of negotiation and compromise between the agency and its stakeholders.  
*Example:* DES used a stakeholder committee composed of internal staff, advocates, clients, and providers to draft a set of certification standards for persons providing in-home services to persons with developmental disabilities. Members of that group volunteered to appear at the G.R.R.C. meeting and to send letters to the G.R.R.C. supporting the proposed rules.
  - **Broadening an agency’s perspective.** An agency may lack a full perspective on the rules and not be aware that certain

regulatory requirements are burdensome, costly, or unworkable to the people who must follow them. Rules that are clear to agency staff may not be clear to members of the public who refer to them infrequently.

## Organizing the rules

### OUTLINE

Start with an outline of major points to cover and number the points in a logical sequence. A single rule should never address more than one subject. In the terminology of the *Code*, a Section is defined as a rule.

### RULE AS A REFERENCE DOCUMENT

Information should be organized and easy to find. Think of questions a reader might ask when fulfilling the rule requirements.

### PROCEDURAL RULES

If the rule is a series of procedures, present them in sequential order, going step-by-step through each procedure. Develop a flow chart of the steps to reveal “holes” in the procedures that can be corrected before the rule is completed. If the procedure is different for different groups of readers, write a rule for each group.

### ORGANIZING METHODS

After the information is gathered and the audience and information importance are determined, analyze the factors that affect how each individual rule should be organized. What factors are most important? Should these be placed first? Or would the rule be more understandable in one of the following methods of organization?

- General to specific (usually the preferred method). An example is 1 A.A.C. 1.
- Chronological order (helpful in explaining time relationships).
- Sequential order.
  - Place the actions in order to explain time relationships:

*Example:*

1. The physician shall perform an examination for assessing the medical and physical fitness of the candidates before conducting the physical examination.
2. The candidate shall undergo a physical examination that includes the following:
3. Upon completion of the physical examination, the candidate shall complete a medical examination that includes the following:
4. The Department shall place the name of the candidate who passes the medi-

- cal and physical examinations on the register for appointment.
- Give step-by-step instructions using the “cookbook method”:

*Example:*

To be considered for appointment, an applicant shall:

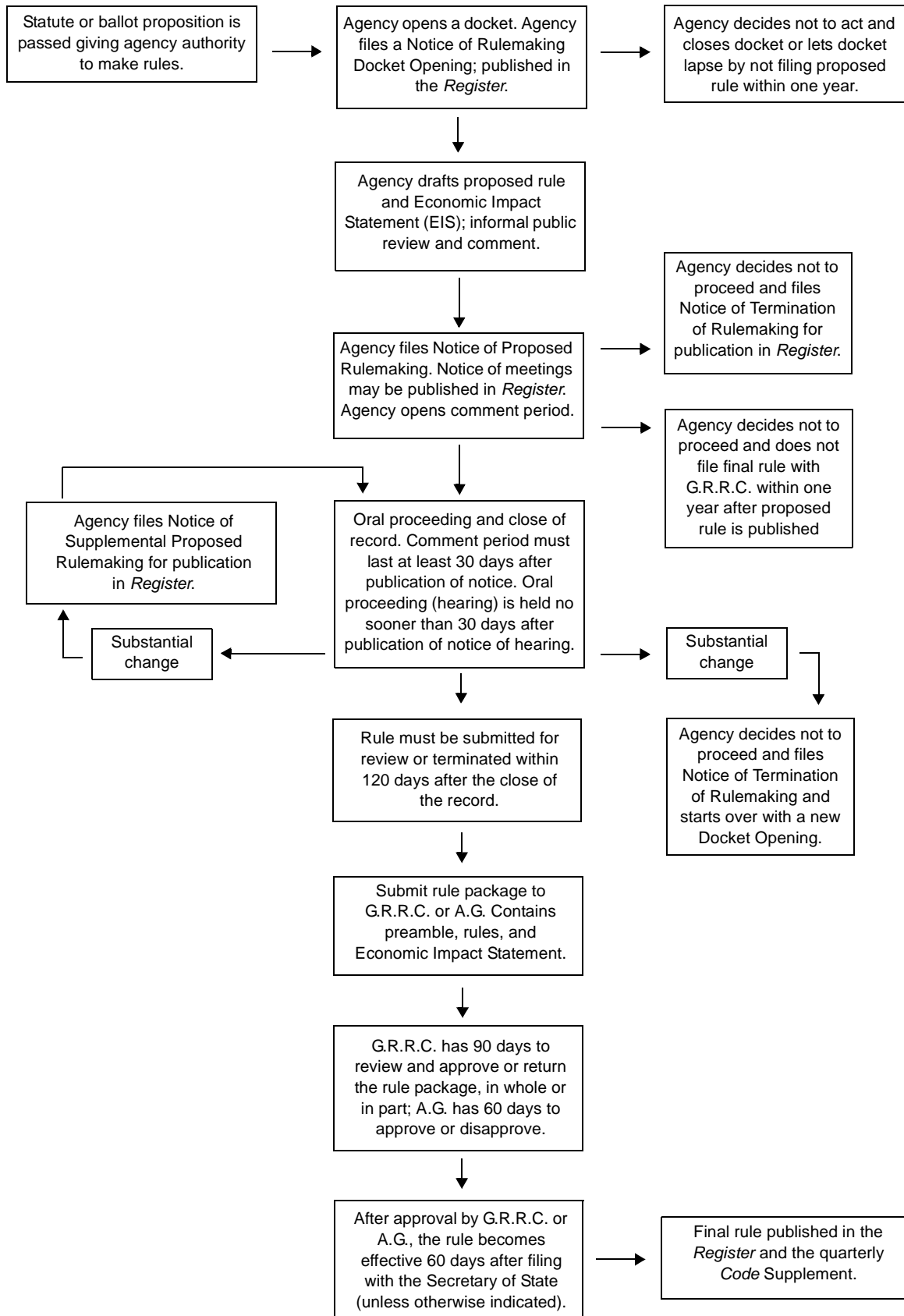
1. Complete the application form;
2. Attach relevant backup materials;
3. Sign and date the form;

4. Complete the affidavit and have it notarized; and
5. File the above materials with the agency.

#### **TABLE OF CONTENTS**

Show organization of the rules by using a table of contents. However, do not include the words “Table of Contents” in the rules when you submit them to the Secretary of State for publication. Section headings must reflect the subject.

## Regular Rulemaking Process



# Section 2 Key

## **codification**

The codification for the *Code* is established in R1-1-102, R1-1-301, and R1-1-402. The Office uses a codification which starts with general subject areas and goes to specific rules.

The Office is the ultimate authority for codification. The Office rarely interferes with the organization of a rule established by the drafter. However, please keep in mind:

Only the Office can create a new **Title**.

Agencies must contact the Office for the designation of a new **Chapter**.

Agencies must consult with and get the approval of the Office before creating **Subchapters** or **Parts**.

## **coemployee**

## **colons**

Use a colon between two independent clauses when the second clause explains or illustrates the first clause and there is no coordinating conjunction or transitional expression linking the two clauses. *The new rules will simplify filing: only electronic submissions will be required.*

Use colons to introduce a list or an example.

Do not use a colon when a form of the verb *to be* is used. *The three courses required in this program are accounting, business English, and Computer Science 22.*

Do not use a colon between two independent clauses when the two clauses are equal in value. Use instead a semi-colon or period.

See **semi-colon**.

Entry words, in alphabetical order, are in **boldface**. They represent the accepted word forms unless otherwise indicated.

Related topics are in **boldface**.

Many entries simply give the correct spelling, hyphenization, or capitalization.

Text explains usage.

Examples of correct and incorrect usage are in italics.

Many topics have cross references to other topics and the A.R.S. and A.A.C. at the end of the entry.